VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 81-48
PAUL BEYOR, et al.)

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On September 21, 1981, the Vermont State Employees' Association ("VSEA") filed this grievance on behalf of Paul Beyor ("Grievant") and other employees of the Agency of Transportation ("Agency"), State of Vermont. The grievance alleges the failure to pay Grievant and other Agency employees overtime for travel between his/her duty station and temporary work location is a violation of Article XVIII(5)(c) of the Agreement between the State of Vermont and VSEA effective July 1, 1979 - June 30, 1981 ("first contract") and Article 19(5)(c) of the Agreement effective July 1, 1981 - June 30, 1982 ("second contract").

A hearing was held January 21, 1982, before the full Board in the Board hearing room in Montpelier. The State was represented by Assistant Attorney General Scott Cameron. Michael R. Zimmerman, Counsel for VSEA, represented Grievant. Requested findings of fact and memoranda were filed by VSEA and the State on February 16 and 18, 1982, respectively.

FINDINGS OF FACT

1. Relevant contractual language is identical in the first and second contracts, and is as follows:

(A) OVERTIME (Article XVIII of the first contract and Article 19 of the second contract):

> Section 5. Computation of Overtime
>
> c. It is expected that travel between work locations shall be conducted during normal working hours. Travel time between work location and work location...shall be considered as time worked for purposes of computing overtime... Subject to the approval of the appointing authority, employees will be paid one round trip per week travel time on season-long construction assignments.
>
> The term "work location" for purposes of this section does not include the employees' home...

(B) MILEAGE REIMBURSEMENT (Article XL of the first contract, and Article 41 of the second contract):

> For authorized automobile mileage actually and necessarily traveled in the performance of official duties, a State employee shall be reimbursed...

(C) EXPENSES REIMBURSEMENT (Article XXXIX of the first contract, and Article 40 of the second contract):

> A. All State employees, when away from home or office on official duties, shall be reimbursed for actual expenses incurred for travel accommodations...reasonable subsistence...
>
> F. Effective July 1, 1980, employees required to be away from their permanent duty station...at the time of a meal, shall be allowed reimbursement for the expense of said meal... subject to the approval of his immediate supervisor that the employee could not have reasonably avoided taking his meal away from his duty station...

K. Work locations shall not be changed for the purpose of avoiding expenses reimbursement.

Neither contract defines the terms "duty station" or "work location" (Grievant's Exhibits 2,3).

2. At the same time as the contracts have been in effect, so has Agency of Administration Bulletin 3.4, entitled "Regulations for Reimbursement of Personal Expenses". The pertinent portions of that regulation are as follows:

2. Transportation - General Provisions

a. Assignment of Official Duty Station

Official duty stations shall be set by the appointing authority for all categories of state employees. That station should be where the employee performs most of his/her official duties. Official duty stations should not be changed unless the change is for a period of longer than two consecutive weeks...

4. Lodging

g. Instate Lodging

(1) If an employee is required to be away from home or official duty station to conduct his regular assigned duties such as highway engineers/technicians...and it is less expensive considering all costs to stay overnight, then overnight lodging will be allowed.

(3) Only with prior approval of the Commissioner of Finance will reimbursement for overnight stays be allowed when the claimant is less than 80 miles from home and his/her official duties end before 9:00 p.m.

10. Constructive Travel Computation

On a scheduled workday when the employee is authorized to travel directly from his home to a temporary location without first reporting

> to his official duty station, he is entitled to mileage from his home to the temporary point (and return, if applicable), or from his official duty station to the temporary point whichever is the lesser. The lesser payment constitutes the 'constructive travel' limitation.

3. Grievant since October of 1972, has been employed by the Agency of Transportation, Materials and Research Division. At all times relevant to this grievance, Grievant's position title has been Transportation Technician B, and his pay scale has been 11 (Grievant's Exhibit 1).

4. At all times relevant to this grievance, Grievant has resided in Barre, Vermont, and his permanent work station has been the Materials Laboratory in Berlin, Vermont.

5. In 1979, at some point before the first contract went into effect, Grievant and about nine other employees were complaining about not getting overtime for travel between temporary assignments and their duty stations. They took their complaints to Roy ("Buzz") Farmer, who was the VSEA steward for the Materials and Research Division. Farmer, rather than trying to present the cases of all 10 employees, chose two representative grievants, one from each division involved. Grievant was selected as the representative of the Materials and Research Division employees. The issue in that 1979 complain was the location of Grievant's (and other employees') official duty station.

6. Farmer, without assistance of any VSEA staff member, and without the knowledge of the Executive Director of VSEA, discussed the complaint with Roy Nicholson, the head of the

Materials and Research Laboratory. Nicholson rejected the employees' claim that Berlin (the location of the Research Laboratory) was their official duty station. Nicholson also informed Farmer not to bother with a Step II grievance (at the Secretary of the Agency level), since their position on the issue coincided with Nicholson.

7. Farmer took the matter to the Step III (i.e. Department of Personnel) level. He did not file a written grievance, but arranged a meeting with Joseph Kecskemethy, Director of Employee Relations, Department of Personnel.

8. Prior to June 27, 1979, the meeting between Farmer and Kecskemethy took place. Present at the meeting besides Farmer and Kecskemethy, were Ray Richardson, Chief Field Representative for VSEA; and William Daye, Personnel Chief, Agency of Transportation.

9. As a result of that discussion Kecskemethy, on June 27, 1979, wrote the following letter to Daye:

> Recently we had some discussions with Ray Richardson and Buzz Farmer about some Highway Techs who are employees of the materials lab. The issue was whether these folks work out of the materials lab on the Barre-Montpelier Road or whether they are assigned to another duty station.
>
> Buzz dropped off some sample work schedules of which I think you have copies. Based on what I see therein, I feel that the employees' official duty station is the materials lab. They should be paid on that basis.
>
> If, of course, employees' official duty stations are actually and justifiably changed for two weeks or more, their hours or work and compensation would reflect that change. Please arrange for appropriate compensation for the persons involved. (State's Exhibit 3)

Farmer and Richardson received copies of the letter.

10. There is no evidence the VSEA Executive Director was aware of this grievance.

11. On July 1, 1979, the first contract went into effect, including the language in Section 5(c) of Article XVIII concerning "season-long contruction assignments" (Grievant's Exhibit 2).

12. The language concerning season-long construction assignments was added specifically to cover those employees of the Agency of Transportation who were assigned to a construction site a long distance from their home for an entire construction season. The construction season is from spring through fall; anything shorter than that is not considered "season-long".

13. On July 17, 1979, William Daye wrote a memorandum to the Director of Engineering and Construction, Agency of Transportation, which provided, in pertinent part, as follows:

> This Agency recently had inquiries relative to travel to and from a work site or compensation for hours outside the standard workday. We have been advised by the Department of Personnel as follows:
>
> > A. Field personnel who travel from location to location without a two or more week assignment to one project will be on payroll for all travel time... In the case of Material personnel, we have agreed to pay this time starting May 14, 1979. Their overtime payment should be approved and forwarded to the Financial Management Division for action.
> >
> > C. Employees assigned for two or more weeks on a project will be on payroll each week for travel time required from either home or the Montpelier office, whichever is shorter, for both time required for travel at the start of the work week as well as the return travel time at the close of the work week. (State's Exhibit 5)

14. After the meeting with Kecskemethy, Farmer reported to Grievant that the resolution of his grievance provided that when he was assigned to a location (other than his Berlin duty station) for two weeks or more, the Agency would pay for his daily commute between Berlin and the work location, would pay his lunch expenses, and would pay overtime for travel for one round trip per week (i.e., a one-way trip to the location on Monday, and a one-way trip from the location on Friday). Since then, that is precisely the way the Agency of Transportation has handled employees' claims for mileage, meals and overtime for travel on assignments of over two weeks duration.

15. For a period beginning May 20, 1981, and ending less than two weeks later, Grievant was assigned to a work location in Williston, Vermont. He commuted each day from his home, using his own car. For that period, Grievant received overtime for travel between his home and work location because it was less than a two-week assignment.

16. For the period June 8, 1981 to August 12, 1981, Grievant was assigned to a work location in West Lebanon, New Hampshire, except for the period July 3-10, 1981, when Grievant was on leave, and Wednesday, July 22, when he was assigned to the Berlin laboratory. Grievant's assignment to West Lebanon was not a season-long construction assignment pursuant to Article XVIII of the first contract and Article 19 of the second contract. The distance between his home

(Barre) and the West Lebanon work location is 57 miles, and the driving time is in excess of one hour. The distance between the Berlin laboratory and the West Lebanon work location is also 57 miles, and the driving time is in excess of one hour.

17. Grievant's assignment to West Lebanon was to inspect bituminous concrete being prepared by a private contractor involved in road building for the State of Vermont. Grievant, because of the nature of his duties, was required to work the same hours as the contractor's employees, which typically meant that work began at about 5:30 a.m., and ended at 5:00 to 5:30 p.m. Grievant was paid for the overtime hours he actually worked during that period, and this grievance does not concern those overtime hours.

18. During the period June 8, 1981 to August 12, 1981, except for the days he was on leave, the day he was assigned to the Berlin lab, and the days it rained (when he would report to the lab for work), Grievant commuted each day between his home and his West Lebanon assignment. The commute took place before (on the way to the assignment) and after (on the way home) normal working hours. Grievant did not request authorization for overnight stays in the West Lebanon area, since he preferred to be with his family as much as possible. On days that it rained, and Grievant had to return to the Berlin lab from West Lebanon, he was paid overtime for travel time. In addition, Grievant was paid overtime for one round trip per week between home and West Lebanon, in accordance with the Agency's policy.

19. During this period, Grievant was not required to commute from home to work every day. He had the option of requesting authorization to stay overnight in a motel. Grievant was aware this option was available to him, and he knew a member of his crew had stayed overnight one or two nights.

20. On days he worked in West Lebanon, Grievant purchased his lunches in the vicinity of the worksite, and was reimbursed for his purchases in accordance with the Agency's policy. In addition, Grievant was reimbursed for all mileage he drove between home and West Lebanon during that period in accordance with the Agency's policy.

21. On June 22, 1981, Grievant submitted a request for overtime travel between West Lebanon and his home (the claim being for hours in excess of those for which he had already been paid for one round trip per week), such claim covering the period from June 8, 1981, to June 20, 1981. He initially submitted that claim to his immediate supervisor, Earl Chaffee, who approved it. Later that same day, however, Grievant's claim was disapproved by Roy Nicholson, head of the Materials and Research Division.

22. Prior to filing this grievance, Grievant discussed with some of his co-workers his intention to file the grievance. His co-workers declined to join him in the grievance.

23. This grievance was filed at Steps II and III by VSEA on behalf of Grievant and "other similarly situated employees". For remedial action, VSEA requested Grievant be made whole for any loss of overtime relating to travel time since June 8, 1981; that he be paid for this travel time from this date forward; and that the July 17, 1979, memo of William Daye be rescinded (Grievant's Exhibits 5, 7). The State denied the grievance at both steps, and did not raise the issue of VSEA's standing to grieve on behalf of "other similarly situated employees" (Grievant's Exhibits 6, 8).

24. On August 17, 1981, after the initiation of this grievance, Grievant's official duty station was changed to Montpelier, Vermont. Grievant was notified of the change through the Personnel Action form which he received in late 1981 or early 1982.

OPINION

Class Action Issue

The Step II and III grievance purported to be on behalf of Grievant and "other similarly-situated employees". Therefore, the first issue before us is whether Grievant is authorized to bring this grievance on behalf of all "similarly-situated" but presently unidentified employees.

3 VSA §1002(d) Provides:

> (d) Orders and decisions of the board shall apply only to the particular case under appeal, but any number of appeals presenting similar issues may be consolidated for hearing with the consent of the board. Any number of employees who are aggrieved by the same action of the employer may join in an appeal with the consent of the board.

We think this statute prevents us from including "similarly-situated" employees in the grievance absent actual appeals by named and identified aggrieved employees. The statute appears designed to avoid the complexities of class actions, allowing this Board to act only when specific employees are "aggrieved by the same action of the employer". Of course, where named people with similar grievances apply to the Board to contest an employer's decision, it would ordinarily be wise and economical to consolidate the cases for hearing and decision.

Accordingly, the scope of this decision will be limited to determining whether Grievant is entitled to overtime for the period he was assigned to West Lebanon.

The Merits

Grievant was normally assigned to work at the Agency's Berlin laboratory. For the period June 8, 1981, to August 12, 1981, Grievant was assigned to a work location in West Lebanon, New Hampshire, where he inspected bituminous concrete prepared by a private contractor involved in road building for the State. Grievant's working hours for the period were typically 5:30 a.m. - 5:30 p.m. On each day of the temporary assignment, Grievant commuted to and from his home and assignment. The distance and commuting time between Grievant's home and West Lebanon and the Berlin laboratory and West Lebanon are the same. Grievant's commute took place outside of normal working hours. The central issue before us is whether Grievant is entitled to overtime pay for commuting time.

The State claims that for the period Grievant was assigned to West Lebanon, his "official duty station" was in West Lebanon and that but for a settlement reached in a 1979 grievance filed by Grievant, a change in "official duty station" would have eliminated the State's obligation to pay any expense reimbursement at all. As a result of the 1979 settlement which resulted in the establishment of an Agency of Transportation policy, the State contends Grievant was entitled to mileage reimbursement for his daily commute between Berlin and West Lebanon, reimbursement for noon meals, and overtime pay for one round-trip per week, but was not entitled to overtime pay for his daily commuting time. Since Grievant was reimbursed here in accordance with the 1979 settlement, the State contends the grievance is without merit.

VSEA contends Grievant's "official duty station" during the period of his assignment to West Lebanon remained Berlin, which entitled him to overtime pay for travel time and mileage reimbursement for his daily commute between West Lebanon and Berlin, pursuant to the contract. VSEA further claims the alleged 1979 "agreement" was made without the knowledge of the VSEA Executive Director, and cannot modify the collective bargaining agreement.

The meaning of two terms - "official station" and "work location" - must be established in order to decide whether Grievant is entitled to overtime compensation. Neither term is defined in the contract, but official station is a statutory term.

32 VSA §1261(a) provides:

> Whenever it shall be necessary to effect the transfer of an employee of the State from one official station to another by direction of the head of a department, said employee shall be reimbursed for his reasonable and necessary moving expenses actually incurred...no such expense shall be allowed unless the transfer is made for the convenience of the State and in no event where it is effected for the convenience or at the request of the employee.

The evident meaning of the term "official station", as the term is used in the statute, is the place where an employee performs the majority of his/her job duties in a given year, the physical place to which he normally reports to work. A change in an employee's "official station" triggers certain rights - moving expenses and reduction in force rights. [See Section 19 of the Reduction in Force article of the relevant contracts (Article XLV of the first contract and Article 47 of the second contract, compare with *Grievance of Frances X. Cantarra*, 1 VLRB 305 (1978)) which gives an employee reduction in force rights if she/he refuses to accept an involuntary transfer outside of his/her geographical area]. Accordingly, a change in "official station" by a department head would require a bona fide change in the situs of the majority of the work to be performed by the incumbent of the position being transferred to a different geographical area. Such a change, in our opinion, could not have been legally made to deprive Grievant of benefits on these facts. We think the Administrative Bulletin 3.4 is incompatible with 32 VSA §1261(a) where it provides in effect that "official duty stations" can be changed if the

work to be done is longer than two consecutive weeks. Each change of official station entitles the employee to "moving expenses" and RIF rights. Surely the Legislature did not intend that moving expenses would be paid for a two-week change of assignment. Such changes imply permanency, not temporary work shifts. An "official station" is akin to the notion of where the work is domiciled.

Here, Grievant performed the majority of his job duties on an annual basis in the Berlin area and was not notified by a personnel action his official station had been changed to West Lebanon. Accordingly, we find Grievant's official station remained the Berlin laboratory.

The relevant contracts entitled Grievant to expenses reimbursement because he was away from his official station. Article XXXIX of the first contract and Article 40 of the second contract, Expenses Reimbursement, provide for meal reimbursement for employees required to be away from their "permanent duty station". "Permanent duty station" and "official station" appear interchangeable in this instance. Article XL of the first contract and Article 41 of the second contract, Mileage Reimbursement, require an employee be reimbursed for "authorized automobile mileage actually and necessarily traveled in the performance of official duties". We think this provision requires mileage reimbursement for travel from official station to work location and return. Grievant, if he chose to do so, could commute daily between West Lebanon and Berlin. He was, thus, entitled to mileage.

Our next task is to determine whether the relevant contracts or statutory provisions required Grievant be paid overtime for the time spent commuting between his official station and the West Lebanon work location. Article XVIII of the first contract and Article 19 of the second contract, Overtime, provide: "Travel time between work location and work location...shall be considered as time worked for purposes of computing overtime..."

The term "work location" means, in our view, any geographical place in which the employee performs work. The official station can be a work location, as can a place away from there. In bureaucratic parlance "the field" is commonly a work location -the term connoting the idea that the employee is performing assigned tasks away from his official station. Clearly, West Lebanon was a "work location" during this period. Leaving aside for the moment the 1979 resolution of a similar grievance and the Agency policy that followed that resolution, it seems clear an employee is entitled to begin and end his work day at his official station, and should be paid for any travel time between official station and another work location. For an example of the State's recognition of this right and its abuse, see Grievance of Barre, 5 VLRB 10 (1982). But for the 1979 grievance resolution, Grievant would be entitled to overtime pay for travel time during his daily commute between Berlin and West Lebanon.

As clear as these principles appear to us, apparently they were not so perceived by the parties. They thought statutory language on this issue, and in particular the State's right to change geographic locations of official stations, was ambiguous, and attempted, through the grievance procedure, to define the limits on the State's right to transfer official stations. The 1979 grievance on this issue was resolved at the Step III - Department of Personnel - level to the satisfaction of VSEA and the apparent satisfaction of Grievant at that time. Since the resolution of the grievance in 1979, the Agency has uniformly handled situations like the one before us in accordance with the 1979 settlement: When an employee is assigned to a work location other than his official station for a period of two weeks or more, the Agency pays mileage between official station and temporary work location, pays lunch expenses, and pays overtime for travel time one round-trip per week. This settlement was not "inconsistent with the terms of the collective bargaining agreement then in effect", 3 VSA §941(j), since the settlement really dealt with a statutory concept; the limits, if any, on the State's right to transfer official stations. It did not purport to interpret contractual language.

The parties see the issue as whether the 1979 settlement constitutes a contractual interpretation binding on the parties in 1981. Although we do not concur that this is the issue, we consider it for whatever light it may shed on this dispute.

VSEA claims the 1979 settlement does not bar this grievance since it was made by a VSEA steward with only bit-player involvement of the union staff, and there is no evidence the VSEA Executive Director even knew of this settlement. We reject this argument. Any grievance settled by a steward is presumed to be known to the union. He has contractual and apparent authority to settle grievances. The State sought in good faith to resolve the matter, and should not be held accountable for a lack of intra-union communication. Moreover, the settlement, as the parties viewed it, did not supplement or cancel the relevant contract then in effect, and did not constitute a renegotiation of its terms in violation of 3 VSA §982(a). Rather, it simply interpreted existing statutory language.

The more fundamental question is whether the settlement became a "past practice" and became an integral part of the contract. The practice of the parties indicates the 1979 settlement has been mutually acceptable to VSEA and the State. Arbitrators have held past practice in essence to be a part of the parties' whole agreement. [See Elkouri and Elkouri, How Arbitration Works, 3rd Ed. (1979), BNA, Chapter 12, "Custom and Past Practice"]. In Metal Specialty Co., 39 LA 1265 (1962), Arbitrator Marvin Volz stated:

> (I)t is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where

> they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations.

The parties' bargaining history, at least before us, indicates their acquiescence in the 1979 settlement. No evidence exists to show VSEA attempted to change the terms of the 1979 settlement. By not bargaining on this, VSEA had led management to believe the past practice was acceptable. Hence, if the sole issue before us was one of contract interpretation, we would find it necessary to dismiss the grievance.

However, the 1979 grievance resolution and Agency Bulletin 3.4 are not contractual interpretations, but statutory ones, which we believe are erroneous, and thus not binding on us or the parties. See 32 VSA §1261(a), and 3 VSA §904(a). 32 VSA §1261(a), as we read it, establishes a fixed "official station" for employees which cannot be resettled by the employer without paying "moving expenses" if the employee decides to move. Thus a two-week or two-month temporary relocation of an "official station" is inconsistent with the statute's command. Necessarily implied in the concept of "moving expenses" is the permanent relocation of the employee's household to be within a reasonable non-compensable commuting distance of his new permanent official station. Thus, in our view, a change of official station involves a bona fide permanent relocation, not a temporary change in work locations to suit the convenience of the employer. We are faced then

with a situation in which the State asserts a right we do not believe it has, and exercise of that right in turn deprives Grievant of his contractual rights to overtime and mileage and expense reimbursement. He, therefore, has a grievance as defined in 3 VSA §902(14) since his official station was not (and in our view of these facts, could not be) changed. Since the 1979 settlement and Agency Bulletin 3.4 are inconsistent with our view of the meaning of the governing statute, we find Grievant is entitled to overtime compensation based on the contractual provisions when applied consistently with statutory principles.

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

1) the grievance of Paul Beyor is allowed;

2) Grievant shall be awarded back-pay at the applicable overtime rate for all hours outside of normal work hours he spent commuting between Berlin, Vermont, and West Lebanon, New Hampshire, during the period June 8, 1981, to August 12, 1981; and

3) the VSEA and the State shall submit to the Board within three weeks of the date of this order a stipulation as to the amount of back-pay due Grievant. Failing agreement on the amount, the matter will be set for hearing before the Board, subsequent to which the Board will issue a final order which includes the specific amount owed Grievant.

Dated this 14th day of April, 1982, at Montpelier, Vermont.

Appealed to Sup Ct

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)
) DOCKET NO. 81-48
PAUL BEYOR, et al.)

ORDER

Based on the findings of fact and the reasons contained in our April 29, 1982 Findings of Fact, Opinion and Order, and based on the Stipulation of the parties at a hearing held June 3, 1982, it is hereby ORDERED:

1) the Grievance of Paul Beyor is allowed; and

2) Grievant shall be awarded $241.96, such amount representing back-pay at the applicable overtime rate for all hours outside of normal work hours he spent commuting between Berlin, Vermont, and West Lebanon, New Hampshire, during the period June 8, 1981 to August 12, 1981.

Dated this 3rd day of June, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney, Chairman

William G. Kemsley, Sr.

James S. Gilson